IN THE

Supreme Court of the United States

OCTOBER TERM 1942

DANIEL J. HOULIHAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdiction

The jurisdiction of this Court is invoked under provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 [U. S. Code, Title 28, Section 347 (a)].

Statement of the Case

The facts have been set forth in the foregoing petition.

SUMMARY OF ARGUMENT

POINT I

A conspiracy to evade the Selective Training and Service Act of 1940, other than by the use of force or violence, does not constitute a violation of Section 311 of Title 50 of the United States Code.

ARGUMENT

POINT I

A conspiracy to evade the Selective Training and Service Act of 1940, other than by the use of force or violence, does not constitute a violation of Title 50, Section 311 of the United States Code.

The petitioner, Daniel J. Houlihan, was indicted, tried, convicted and sentenced upon a charge of conspiring to violate what is commonly known as the Selective Training and Service Act of 1940 (Title 50, Section 311, U. S. Code). The indictment charged that Daniel J. Houlihan conspired with Francis M. O'Connell and James M. O'Connell to enable Francis M. O'Connell, one of the persons subject to the Act, to evade service with the armed forces of the United States. Upon the argument of the motions to dismiss the indictment and throughout the case the petitioner contended that the only conspiracy punishable under the Selective Service Act is one where force or violence is to be used. The contention of the Government is that the particular section of the Act makes any conspiracy to violate it a crime punishable thereunder. In accordance with this contention, the Government made no effort to introduce any evidence proving that the conspiracy was one to hinder or interfere with the administration of the Selective Service Act, by force or violence.

Inasmuch as there are no reported decisions involving the construction of this section of the law, it seems proper to refer to analogous previous legislation (*Thompson* v. *Thompson*, 218 U. S. 611). During the last war a Selective Service Draft Act was enacted in 1917 and amended and recorded in 1918 as Chapter 15, Paragraph 6, 40 Stat. 80 (Comp. Stat. 1918, Par. 2044F).

The statutes of 1917 and of 1940 are shown in parallel as follows: They differ only in the words set forth in bold type.

Selective Draft Act of 1917, Title 50, Section 206, United States Code. (Appendix)

OFFENSES AND PUNISHMENT

Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said Act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, **exemption, enlistment**, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations **made by the President thereunder**, or otherwise evades or aids another to evade the requirements of

Selective Training and Service Act of 1940—Title 50, Section 311, United States Code.

OFFENSES AND PUNISHMENT

Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the **rules or** regulations made or directions given thereunder, who shall **knowingly** fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, **rules,** regulations, or directions who shall knowingly make, or be a party to the making, of any false, **improper,** or incorrect registration, **classification,** physical **or mental** examination, **deferment, induction,** enrollment, or muster, and any person who shall **knowingly** make, or be a party to the making of, any false statement or certificate as to the fitness **or unfitness** or liability **or non-liability** of himself or any other person for service under the provisions of this Act, or **rules,** regulations, **or directions made pursuant thereto,** or

this Act or of said regulations, or who, in any manner, shall fail or neglect **fully** to perform any duty required of him in the execution of this Act, shall, **if not subject to military law, be guilty of a misdemeanor,** and upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than **one year,** or, if subject to military law, **shall be** tried by court-martial and suffer such punishment as a court-martial may direct. **May 18, 1917, c. 15, Sec. 6, 40 Stat. 80.**

Pertinent Change

Pertinent Change

who otherwise evades **registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels,** aids, **or abets** another to evade **registration or service in the land or naval forces or any of** the requirements of this Act, or of said **rules,** regulations, **or directions,** or who in any manner shall **knowingly** fail or neglect to perform any duty required of him **under or** in the (execution of this Act, **or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall upon conviction** in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than **five years or a fine of not more than $10,000,** or **by both such fine and imprisonment,** or if subject to military **or naval** law **may be** tried by court martial, **and, on conviction, shall** suffer such punishment as a court martial may direct. **No person shall be tried by any military or naval court martial in any case arising**

under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under the laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act. Sept. 16, 1940, 3:08 p.m. E.S.T. c. 720, Sec. 11, 54 Stat.

Thus the only phrase in Title 50, Section 311 which refers to conspiracy was inserted in the law:

> "* * * or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so * * *."

This is the only place in the entire section where "persons" are referred to. It is now claimed by the Government that the last phrase above ("or conspire to do so") covers the entire section of the Act of 1940 from the beginning.

The section itself begins with the wording "any person" and is followed by "and any person", until the section comes to that part of the Act dealing with conspiracy and then it refers to "persons" knowlingly interfering or hindering by force or violence, with the administration of the Act, or conspiring to do so. It is rather to be assumed that Congress intended what this means in good English and not that it used bad grammar. The plural form of the verb is used—"conspire"—rather than the singular "conspires", and by the use of this plural form the reasonable construction is that the conspiracy referred to is by the "persons who hinder

* * * by force or violence". If this conspiracy clause relates all the way back to "any person", the verb necessarily would be "conspires", as the subject is in the singular.

If Congress had intended to include a provision in the Act itself making it a crime to conspire, without force or violence, to interfere with the administration of the Act, the words "or otherwise" could easily have been inserted after the phrase "by force or violence". This was not done. There were other simple ways in which the Congress could have made clear that it intended to provide in the Act itself for the punishment of conspiracies to violate its provisions generally; for example, by inserting at the conclusion of the entire paragraph such words as "or any person or persons who conspire to violate any of the foregoing provisions of this section, shall upon conviction" etc. * * *.

As noted above, the Act of 1940 differs from the prior draft legislation in two principal points: First, as to the penalty. The maximum punishment under the Act of 1917 was imprisonment for one year, whereas under the Act of 1940 it is for a term of five years. Secondly, no provision was contained in the Act of 1917 providing for punishment of a conspiracy to violate the Act by any specific means set forth therein, whereas the Act of 1940 at a point near the end of the section includes the conspiracy provision hereinbefore recited. Because of the failure in the 1917 Act to provide for punishment for conspiracy to hinder the administration of the Act by force or violence, it was necessary to prosecute such conspirators under the General Conspiracy statute, being Title 18, Section 88 of the U. S. Code (*Hammerschmidt* v. *United States*, 265 U. S. 182; *Gruher* v. *United States*, 255 Fed. 474; *United States* v. *Galleanni*, 245 Fed. 977; *Firth* v. *United States*, 253 Fed. 36). This General Conspiracy statute, however, provided for a maximum penalty of imprisonment for a term of two years, which penalty was apparently regarded as inade-

quate in cases involving a willful conspiracy to obstruct, *by force or violence* the enforcement of the Selective Draft Act of 1917. Resort was then had to Title 18, Section 6, commonly known as the "Seditious Conspiracy Act", providing the maximum imprisonment of six years (*Reeder* v. *United States*, 262 Fed. 36; certiorari denied 252 U. S. 581; *Enfield* v. *United States*, 261 Fed. 141). Thereafter, following the declaration of war by the United States in 1917, the Espionage Act, Title 50, Sections 32-34, was enacted which punished conspiracies to willfully obstruct recruiting or enlistment with a maximum penalty of twenty years' imprisonment. Some confusion arose by reason of the two statutes in the United States Code under which prosecutions could be maintained for conspiring to interfere by force or violence with the Selective Draft Act of 1917. It was finally determined in *Haywood* v. *United States*, 268 Fed. 795, certiorari denied 256 U. S. 689, that a conspiracy by force or violence to obstruct the enforcement of the Selective Draft Act, was properly prosecuted under the Espionage Act, which fixes punishment of twenty years' maximum imprisonment, rather than by a prosecution under Title 18, Section 6 (Seditious Conspiracy) which provided for only a six-year maximum sentence.

When the Selective Service Act of 1940 was enacted, this country was not at war. The provisions of the Espionage Act, Title 50, Section 34, were therefore inapplicable. Some punishment more drastic than the one prescribed under the General Conspiracy Act, Title 18, Section 88, carrying with it a two-year penalty, was desired. There was therefore incorporated in the Act of 1940 a provision that conspiracies to hinder the administration of the Act by force or violence were punishable with a sentence equal to that meted out for the specific violations of the Act, namely, imprisonment for five years. Through experience in the enforcement of the previous Selective Draft legislation in 1917, it had been found

necessary to regard conspiracies employing force or violence as offenses equal in gravity and severity with the substantive violations themselves. It is the contention of the petitioner, however, that this did not extend to an ordinary conspiracy without force or violence, and the Statute does not so provide.

In *Fasulo* v. *United States*, 272 U. S. 620, in an opinion by Mr. Justice Butler, it is said at page 629:

> "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute."

The Selective Service Act of 1940 is an all important statute affecting the lives of every American family. It is therefore regarded as of the highest importance that the construction of this law be clarified and finally determined.

Conclusion

This Court has repeatedly held that a penal statute must be definite and certain so that no one may be required in peril of life, liberty or property, to speculate as to its meaning. It is respectfully submitted that the meaning and effect, and particularly of the penal provisions of the Selective Training and Service Act of 1940, Section 311, Title 50, should be determined by this Court and that therefore the question involved in this application is of sufficient importance to require an exercise of this Court's supervisory jurisdiction by writ of certiorari.

Respectfully submitted,

Arthur Garfield Hays,
Solicitor for Petitioner.

Seymour M. Heilbron,
of Counsel.